STATE OF MICHIGAN

COURT OF APPEALS

CRYSTAL ARNOLD,

Plaintiff-Appellant-Cross-Appellee,

v

MIDMICHIGAN MEDICAL CENTER-MIDLAND,

Defendant-Appellee-Cross-Appellant.

UNPUBLISHED
July 26, 2007

No. 274488
Midland Circuit Court
LC No. 06-009665-NH

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals the grant of summary disposition in favor of defendant based on an incomplete jurat on the affidavit of merit filed in this medical malpractice action. Defendant cross appeals asserting, in the alternative, the propriety of summary disposition on plaintiff's claim of res ipsa loquitur. Having initially held this matter in abeyance, *Arnold v MidMichigan Medical Center, Midland*, unpublished order of the Court of Appeals, entered June 12, 2007 (Docket No. 274488), pending our Supreme Court's decision in *Kirkaldy v Rim*, 477 Mich 1063; 728 NW2d 862 (2007), we now reverse and remand this matter to the trial court.

On April 27, 2004, plaintiff was admitted to defendant for removal of her gallbladder. Following successful completion of the medical procedure, plaintiff asserts defendant's staff dropped her while transferring her from the operating table to a gurney. Although plaintiff was under anesthesia and not fully conscious when the alleged event occurred, she does recall a nurse standing over her and instructing her not to move, which she associates with having been dropped by defendant's staff. Later, during her post-operative check up, the physician that performed the gallbladder procedure stated he was not to be blamed for her being dropped and that she should follow up with her family physician if she experienced any physical problems. Defendant has consistently denied that plaintiff was dropped during any form of transfer while under its care.

Plaintiff consulted with her family physician due to right shoulder and right upper back pain. When physical therapy did not alleviate these physical complaints, plaintiff underwent surgical intervention for a herniated disk and cervical radiculopathy. Plaintiff filed a notice of intent, in accordance with MCL 600.2912b and a three-count complaint alleging negligence, medical malpractice and res ipsa locquitur.[1] In conjunction with the filing of her complaint, plaintiff also submitted an affidavit of merit, signed by Grace McCallum, R.N., which is the primary focus of this appeal.

Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(7) and (C)(8), alleging plaintiff failed to state a claim under the doctrine of res ipsa loquitur. In addition, defendant contended the affidavit of merit was fatally defective because of the incomplete jurat, resulting in the expiration of the statute of limitations. Defendant contended the affidavit of merit was insufficient because it addressed only the standard of care for nursing staff and could not apply to other medical or professional staff potentially involved in the patient transfer. The trial court ruled, "Plaintiff has stated a medical malpractice claim against Defendant on the theory of vicarious liability at least with respect to its nurses." Although the trial court described plaintiff's allegations as being "loose" it was determined that "all the necessary elements for a res ipsa loquitur case" were met.

In reference to the affidavit of merit, the trial court concurred with defendant that it was fatally defective because it failed to comply with MCL 55.287(2) of the Michigan Notary Public Act, MCL 55.261 *et seq.* The affidavit contained the signature of the notary, date of execution and the date of the notary's commission expiration, but lacked the notary's typed name and the county in which her commission was effective or where the notarial act occurred. Relying, in part, on *Apsey v Memorial Hosp*, 266 Mich App 666; 702 NW2d 870 (2005),[2] the trial court ruled, in relevant part:

> [T]his Court holds that the notarial act, if any, underlying Plaintiff's affidavit of merit is invalid for the purpose of commencing her medical malpractice claim. Since the action has not been properly commenced for lack of a valid affidavit of merit, Plaintiff's claim is now barred by the two-year statute of limitations.

At her motion for reconsideration, plaintiff presented the affidavit of the notary, Teresa A. Kurtinaitis, providing her seal and verifying she was a notary public "duly registered in the State of Michigan for the County of Wayne," and that she had "confirmed the oath or affirmation" of plaintiff's expert witness. The trial court denied the motion.

On appeal, plaintiff challenges the grant of summary disposition in favor of defendant and the denial of her motion for reconsideration based on the failure of the affidavit of merit to comply with MCL 55.287(2). Plaintiff contends that the affidavit of merit meets the

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[1] The general negligence count was dismissed by the stipulation of the parties.

[2] We would note that our Supreme Court has subsequently overruled this decision. *Apsey v Memorial Hosp,* 477 Mich 120; 730 NW2d 695 (2007).

requirements of MCL 600.2912d(1) and that any technical deficiency in the jurat is inconsequential. We review de novo a trial court's decision on a motion for summary disposition. *Wilson v Alpena Co Rd Comm,* 474 Mich 161, 166; 713 NW2d 717 (2006).

MCL 600.2912d(1) provides, in relevant part:

> [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under section 2169. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
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> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been take or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

Advocating form over substance, defendant contends that the certification on the affidavit of merit does not comport with statutory requirements. Plaintiff asserts that the deficiency in the jurat is unrelated to the substantive affirmations of the affidavit and, thus, sufficiently complies with the requirements of MCL 600.2912d(1).

In *Holmes v Michigan Capital Med Ctr*, 242 Mich App 703, 711; 620 NW2d 319 (2000), this Court discussed the formal requirements of an affidavit, stating in relevant part:

> To constitute a valid affidavit, a document must be (1) a written or printed declaration or statement of facts, (2) made voluntarily, and (3) confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.

MCL 600.2912d(1) does not expressly mandate a jurat, requiring only "an affidavit of merit signed by a health professional . . . ." Contrary to other cases determining an affidavit of merit to be a nullity because it completely lacked a jurat or any indication that the affiant confirmed the document's contents by oath or affirmation, the only issue in this case pertains to the failure of the jurat to conform to MCL 55.287(2), which provides:

(1) A notary public shall place his or her signature on every record upon which he or she performs a notarial act. The notary public shall sign his or her name exactly as his or her name appears on his or her application for commission as a notary public.

(2) On each record that a notary public performs a notarial act and immediately near the notary public's signature, as is practical, the notary public shall print, type, stamp, or otherwise imprint mechanically or electronically sufficiently clear and legible to be read by the secretary and in a manner capable of photographic reproduction all of the following in this format or in a similar format that conveys all of the same information:

(a) The name of the notary public exactly as it appears on his or her application for commission as a notary public.

(b) The statement: "Notary public, State of Michigan, County of _____.".

(c) The statement: "My commission expires _____.".

(d) If performing a notarial act in a county other than the county of commission, the statement: "Acting in the County of _____."

(e) The date the notarial act was performed.

The requirements and effect of a jurat have been further defined by case law as follows:

> The jurat is simply a certificate evidencing the fact that the affidavit was properly made before a duly authorized officer. Although it has been said that strictly speaking it is no part of the affidavit, but simply evidence that the latter has been duly sworn to by the affiant, common prudence would dictate that a properly executed jurat be attached to every affidavit. Its omission, however, in the absence of a statute to the contrary, is not fatal to the validity of an affidavit, so long as it appears either from the rest of the instrument or from evidence aliunde that the affidavit was in fact duly sworn to before an authorized officer. This rule is based upon the principle that a party should not suffer by reason of the inadvertent omission of the officer to perform his duty. [*Wise & Rich v Yunker*, 223 Mich 203, 206; 193 NW 890 (1923) (citation omitted).]

In this instance, plaintiff's affidavit of merit contained an incomplete jurat. Despite being incomplete, the jurat demonstrates that McCallum signed the affidavit of merit under oath before a notary public. The only dispute pertains to the identification of the notary public's name and the county in which the notarial act occurred or the notary was authorized to act. McCallum's expertise as a nurse and the content of the affidavit are not specifically challenged. Because the content of the affidavit evidences confirmation by oath or affirmation before a notary it substantially complies with both the requirements of MCL 600.2912d(1) and the formal requirements for an affidavit and should not have been deemed invalid by the trial court. This is consistent with our Supreme Court's recent ruling in *Kirkaldy* overruling a line of cases, which held "that filing a defective affidavit of merit is the functional equivalent of failing to file an

affidavit of merit for the purpose of tolling the period of limitations." *Kirkaldy, supra* at slip op p 2. The implication of this ruling is that affidavits, even if defective or nonconforming, do not require dismissal of an action. Rather, despite their deficiencies, such affidavits are "presumed valid," leaving it within "the court's province to determine the sufficiency of [the] pleading[s]." *Saffian v Simmons*, 477 Mich 8, 13; 727 NW2d 132 (2007).

Defendant further contends the affidavit of merit is deficient because McCallum fails to indicate that she reviewed defendant's records in determining a breach of the standard of care. This claim is disingenuous. Notably defendant has denied that a fall occurred and, therefore, it is questionable whether any relevant documentation even exists within defendant's file or medical records pertaining to plaintiff's claim. Further, MCL 600.2912d(1) requires only "that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice." There is no specific requirement that the hospital or medical provider's records must have been reviewed in order for the expert to ascertain a breach of the standard of care.

On cross appeal, defendant asserts, as an additional theory supporting partial dismissal of this action, that plaintiff has not set forth a sufficient pleading for her claim of res ipsa loquitur. In accordance with *Jones v Porretta*, 428 Mich 132, 150-151; 405 NW2d 863 (1987) (footnotes and citations omitted):

> The major purpose of the doctrine of res ipsa loquitur is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act . . . . [I]n order to avail themselves of the doctrine, plaintiffs in their cases in chief must meet the following conditions:
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> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
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> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
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> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.

A fourth criterion has also been identified, which requires that "[e]vidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff." *Wilson v Stilwill*, 411 Mich 587, 607; 309 NW2d 898 (1981). While application of the doctrine of res ipsa loquitur is limited in cases of medical malpractice, "[a] res ipsa case is a circumstantial evidence case. In a proper res ipsa loquitur medical case, a jury is permitted to infer negligence from a result which they conclude would not have been reached unless someone was negligent." *Jones, supra* at 155-156 (citations omitted). However, "[s]uch an inference [of negligence] must be based on more than speculation. If it is to be drawn from the happening of an accident, there must be common knowledge or expert testimony that when such an accident occurs, it is more probably than not the result of negligence." *Id.* at 153.

It is well established that "a prima facie res ipsa medical malpractice case requires more than a showing of bad result." *Jones, supra* at 152. In this instance, plaintiff has failed to prove

the first element of res ipsa loquitur. Specifically, no evidence was provided that her alleged physical complaints would not normally occur in the absence of negligence. "Because we do not know whether the injury complained of does not ordinarily occur in the absence of negligence, we cannot properly apply the doctrine of res ipsa loquitur." *Woodard v Custer,* 473 Mich 1, 8; 702 NW2d 522 (2005).

Specifically, the evidence was insufficient to support an inference that a breach of the standard of care caused the alleged injuries. In *Skinner v Square D Co,* 445 Mich 153, 164; 516 NW2d 475 (1994), the Court noted that "[t]o be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." A plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. *Kaminski v Grand Trunk W R Co,* 347 Mich 417, 422; 79 NW2d 899 (1956). Plaintiff's assertion comprises mere speculation given that plaintiff has no independent recall or proof of the occurrence of any negligent act and has only an isolated and unverified statement from her physician that a problem occurred in her physical transfer from or within the operating room. More importantly, there is no indication that plaintiff's alleged injury was not merely the result of positioning or other factors that occur routinely during surgery, or which were pre-existent. In other words, there is no reasonable inference that "but for" defendant's negligence the injury complained of by plaintiff would not have occurred.

The mere possibility that a breach of duty by defendant caused plaintiff to sustain injuries is not sufficient to establish causation or to apply the doctrine of res ipsa loquitur. *Berryman v KMart Corp,* 193 Mich App 88, 92; 483 NW2d 642 (1992); *Cloverleaf Car Co v Phillips Petroleum Co,* 213 Mich App 186, 194; 540 NW2d 297 (1995). Because the evidence must demonstrate more than a mere possibility and courts cannot permit a jury to guess, *Skinner, supra,* 445 Mich 166 (citation omitted), the trial court should have dismissed plaintiff's claim under this theory of causation.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter